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No. 04-774

Supreme Court, U.S.
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In the

Supreme Court of the United States

BONIFACIO VITUG SAGANA,

Petitioner,

v.

JOAQUIN A. TENORIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the mere protection of discrete interest groups against economic competition by other interest groups a legitimate state interest for purposes of the Equal Protection Clause?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. PLF's Economic Liberty Project protects the right to earn a living both through direct litigation and by participating as amicus curiae in appellate courts. PLF has participated as amicus curiae in cases such as *Powers v. Harris*, No. 04-716 (U.S. filed Nov. 22, 2004); *RUI One Corp. v. City of Berkeley*, No. 04-582 (U.S. filed Oct. 28, 2004); and *Bank of America v. San Francisco*, 309 F.3d 551 (9th Cir. 2002). Because of its history and expertise with regard to economic liberty and the right to earn a living, PLF believes its perspective will aid this Court in considering the petition for certiorari.

SUMMARY OF ARGUMENT

The Commonwealth of the Northern Mariana Islands (CNMI)—which is subject to the Fourteenth Amendment the same as a state, *Basiente v. Glickman*, 242 F.3d 1137, 1143 (9th Cir. 2001)—enforces a law known as the Nonresident Worker's Act (NWA), which places heavy restrictions on the employment of lawfully admitted alien workers. Among other things, the law requires employers who wish to hire nonresidents to notify the CNMI Department of Labor, which seeks resident workers

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

to place in the position instead. At least ten percent of an employer's work force must be made up of residents. The Department of Labor preapproves all employment contracts for nonresident workers, and employers are required to post a bond covering three months of wages, medical coverage, and repatriation expenses. Employers must pay nonresidents biweekly, in cash, and must pay a special minimum wage. The NWA forbids the hiring of nonresident workers for certain jobs entirely. *Sagana v. Tenorio*, 384 F.3d 731, 734-35 (9th Cir. 2004). Petitioner, a nonresident, challenged the NWA as a violation of the Equal Protection Clause.

The Ninth Circuit found that these restrictions are not designed to protect the public against dangerous or wrongful business practices, but are instead designed to "giv[e] job preference to its residents, and protect[] the wages and conditions of resident workers" against competition from lawfully admitted nonresidents. *Id.* at 741. These preferences, the court found, are legitimate state interests for purposes of the Fourteenth Amendment. In short, protecting a discrete economic interest group is, *per se*, a legitimate state interest.

This holding exacerbates a circuit split between the Fourth, Sixth and Tenth Circuits. The Fourth and Sixth Circuits have held that economic regulations must serve some public purpose rather than a mere intent to discriminate. *See, e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("protecting a discrete interest group from economic competition is not a legitimate governmental purpose"); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1322 (4th Cir. 1994) (protectionism must "advance[] a purpose, beyond . . . naked preference . . . . [or] 'parochial discrimination' "). The Tenth Circuit, on the other hand, recently held that protecting a discrete interest group against economic competition is, in itself, a legitimate state interest, even where it bears no rational relationship to protecting the public health, safety, and welfare. *See Powers v.*

Harris, 379 F.3d 1208 (10th Cir. 2004), *petition for cert. filed*, (U.S. Nov. 22, 2004) (No. 04-716). This conflict can only be settled by this Court.

The decision below also disregards repeated holdings by this Court that, while states have broad discretion to regulate the economy and protect the public, such discretion does not allow states to discriminate against lawfully admitted aliens solely to benefit citizens. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634, 643-45 (1973); *Cabell v. Chavez-Salido*, 454 U.S. 432, 436-38 (1982). The decision below ignores these holdings, and affirms the CNMI's authority to bar lawfully admitted aliens from certain occupations solely to protect the wages of residents.

Finally, the decision below implicates vital federal questions. The right to earn a living without arbitrary government interference is an essential component of the Fourteenth Amendment, and laws which broadly deny lawfully admitted aliens substantial opportunities for employment deprive them of an essential aspect of liberty. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976). The frequency with which states attempt to restrict the economic opportunities of outsiders for the benefit of political insiders, is alone testament to the importance of this Court's consideration of this case.

The decision below conflicts with the holdings of at least three other circuit courts, as well as the decisions of this Court, and implicates important questions of constitutional law. The petition for certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE NINTH CIRCUIT EXACERBATES A CONFLICT BETWEEN THE FOURTH, SIXTH, AND TENTH CIRCUITS REGARDING THE CONSTITUTIONALITY OF RAW ECONOMIC DISCRIMINATION

The court below upheld the explicitly discriminatory provisions of the Nonresident Worker's Act on the grounds that excluding nonresident workers raises the wages of resident workers. The decision below holds that economic protectionism, *per se*, is a legitimate state[2] interest:

> The CNMI legislature has seen fit to create a temporary class of employees for the purpose of bolstering the CNMI economy, giving job preference to its residents, and protecting the wages and conditions of resident workers while enforcing a system to control and regulate its visiting laborers. These are reasonable, important purposes.

Sagana, 384 F.3d at 741.

But holding that economic restrictions which are solely designed to give preference to residents at the expense of nonresidents is a legitimate state interest conflicts with the decision of the Sixth Circuit Court of Appeals in *Craigmiles*, 312 F.3d at 224, which holds that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." In that case, the State of Tennessee

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[2] Although the Commonwealth of the Northern Mariana Islands is not a state, it is subject to the Fourteenth Amendment in the same way as the states. With this in mind, amicus uses the term "state" when referring to the CNMI's relationship to the Fourteenth Amendment.

enforced an occupational licensing law which prohibited people from selling caskets without first obtaining an expensive and burdensome funeral director's license. The licensing law, the court found, had no connection to protecting the public from fraudulent or shoddy business practices, but was created solely to provide monopoly profits to those who already had the license. *See Craigmiles*, 312 F.3d at 225 (law had no "legitimate purpose other than protecting the economic interests of licensed funeral directors.").

As the *Craigmiles* court recognized, the government's authority to regulate the economy, though quite broad, does not allow "arbitrary nor discriminatory" regulations. *Nebbia v. New York*, 291 U.S. 502, 537 (1934). A licensing law is arbitrary or discriminatory when it has no "rational connection with the applicant's fitness or capacity to practice" the trade in question. *Schware v. Bd. of Bar Examiners of the State of N.M.*, 353 U.S. 232, 239 (1957). Thus, the Sixth Circuit held, a licensing law designed to accomplish nothing more than monopoly profits for legal insiders was unconstitutional. *See Craigmiles*, 312 F.3d at 228 ("The licensure requirement imposes a significant barrier to competition in the casket market [so as to] . . . . protect[] licensed funeral directors from competition . . . .").

Like the Sixth Circuit, the Fourth Circuit also held that mere economic protectionism is not a legitimate state interest. In *Setzer*, 20 F.3d 1311, the court held that a South Carolina law requiring cities to purchase products from in-state companies so long as the products were up to five percent more expensive than imported alternatives, violated the Equal Protection Clause of the Fourteenth Amendment. Relying on this Court's decision in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), the court of appeals noted that even under the deferential rational basis test, mere favoritism is not a legitimate state interest:

> In *Ward*, Alabama asserted that [giving market preferences to in-state industries] . . . was legitimate simply because it would benefit certain individuals . . . . But . . . "under the State's analysis, *any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another . . . ." Instead, the Court demanded not only that Alabama state that the line being drawn would benefit some group (a truism), but also that it articulate some legitimate reason for the line to be drawn at all. Looking into the second matter, the Court perceived . . . nothing more than "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent."

Setzer, 20 F.3d at 1321-22 (quoting *Ward*, 470 U.S. at 882, 878). In short, the Sixth and Fourth Circuits have held that economic regulations which create preferences must be justified by some legitimate public purpose, rather than mere favoritism to those who are more politically adept. This reflects the proposition that, in Professor Sunstein's words,

> government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another. The constitutional requirement that something other than a naked preference be shown to justify differential treatment [helps] ensur[e] that government action results from a legitimate effort to promote the public good rather than from a factional takeover.

Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690 (1984).

The decision below ratifies discrimination against nonresident aliens in employment opportunities for the explicit purpose of raising the income of resident laborers. It is a raw

protectionist scheme based not on the protection of the public against dangerous or unfair business practices, but solely and admittedly to give "job preference to its residents, and protect[ ] the wages and conditions of resident workers." *Sagana*, 384 F.3d at 741. The court of appeals found this to be a legitimate state interest, *per se*, despite the Eighth Circuit's holding that "it is untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest. An intent to discriminate is not a legitimate state interest." *Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983).

On the other hand, the Tenth Circuit, in a decision on facts almost identical to those present in *Craigmiles*, upheld an Oklahoma law prohibiting people from selling caskets without a funeral director's license. *See Powers*, 379 F.3d 1208. The Tenth Circuit held that explicit economic protectionism per se is a legitimate state interest. *See id.* at 1221. Like the decision below, *Powers* holds that the rational basis test is not violated by economic regulations which discriminate against outsiders for the benefit of politically favored groups.

This division between the circuits is on a matter of vital importance. As the Tenth Circuit noted in *Powers*, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." 379 F.3d at 1221. Likewise, laws restricting the job opportunities of lawfully admitted aliens are a common constitutional problem. Hostility toward immigrants and immigration routinely has been predicated on competition for jobs. *See generally* Irene Scharf, *Tired of Your Masses: A History of and Judicial Responses to Early 20th Century Anti-Immigrant Legislation*, 21 U. Haw. L. Rev. 131, 137 (1999) ("Not only did business leaders attack the newcomers, but so also did organized labor, jealous of competition for jobs from the immigrants."); Thomas Sowell, *The Economics and*

Politics of Race 204 (1983) ("suppliers of labor . . . seek to restrict the numbers and categories of labor admitted.")

The Fourteenth Amendment, however, prohibits states from discriminating against newcomers in the search for employment. *See further Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (discrimination against out-of-state residents violates Privileges and Immunities Clause); *Sugarman*, 413 U.S. at 643-45 (law prohibiting lawfully admitted aliens from state civil service jobs violates Equal Protection Clause). As long ago as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court confronted an attempt by the State of California to restrict the employment opportunities of Chinese immigrants for the benefit of natives and white immigrants. There, the Court explicitly rejected economic protectionism as a legitimate state interest. *See id.* at 374 ("the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal . . . and a violation of the fourteenth amendment.").

The tendency of legislatures to restrict employment opportunities to favored constituencies is a constant threat to the rights of aliens who are entitled to the equal protection of the law. *See* Iris Chang, *The Chinese in America: A Narrative History* 38-156 (2003) (detailing California's 19th century legal discrimination which "ma[de] it difficult for the Chinese [immigrants] to find any work at all." *Id.* at 128.). The Court should grant certiorari to rectify the split between the circuits over whether economic protection of residents against competition from newcomers is a legitimate state interest.

II

THE DECISION BELOW DISREGARDS THIS COURT'S SETTLED PRECEDENT REGARDING THE LIBERTY OF LAWFULLY ADMITTED ALIENS TO ENGAGE IN A LAWFUL OCCUPATION, IMPLICATING IMPORTANT FEDERAL QUESTIONS UNDER THE EQUAL PROTECTION CLAUSE

The decision below is also directly contrary to this Court's repeated holding that the Fourteenth Amendment prohibits states from enforcing labor laws that discriminate against lawfully admitted aliens. *See, e.g., Yick Wo*, 118 U.S. 356; *Truax v. Raich*, 239 U.S. 33 (1915). In *Truax*, for example, the Court struck down an Arizona law which was "frankly . . . title[d] . . . . 'an act to protect the citizens of the United States in their employment against noncitizens . . . .'" *Id.* at 40-41. There, the Court held that mere economic protectionism against legally admitted noncitizens violates the Constitution.

Although *Schware*, 353 U.S. 232, did not involve aliens, it is instructive on the fact that the state has no legitimate authority solely to protect favored economic interest groups against economic competition from outsiders. Rather, economic regulations must aim at accomplishing some legitimate state interest in protecting the public health, safety, and welfare. In *Schware*, this Court held that a man who had been a member of the Communist Party could not be denied the opportunity to take the bar exam for that reason. The Court held that this violated the Fourteenth Amendment because it bore no connection to a legitimate requirement that a person demonstrate his qualification to practice: any legal qualification for engaging in a trade

> must have a rational connection with the applicant's fitness or capacity to practice . . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Schware, 353 U.S. at 239.

Occupational licensing could not be used for the sole purpose of excluding those who are unpopular, the *Schware* Court held; rather, such laws must promote the legitimate state interests of protecting the public safety by ensuring that practitioners are qualified. But the NWA prohibits nonresident aliens from engaging in certain trades and professions solely to protect the income of the favored workers. Such a prohibition has no rational connection with Mr. Sagana's fitness or capacity to engage in a trade. Instead, it is a naked preference for resident workers, intended to "giv[e] job preference[s] . . . and protect[] the wages" of a politically powerful interest group. *Sagana*, 384 F.3d at 741. This violates the Equal Protection Clause.

In *Sugarman*, 413 U.S. 634, the Court held that a New York law limiting civil service positions to citizens of the United States violated the Equal Protection Clause. Aliens are "entitled to the shelter of the Equal Protection Clause," the Court held: "[t]his protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who 'work for a living in the common occupations of the community.'" 413 U.S. at 641 (quoting *Truax*, 239 U.S. at 41). The state argued that the citizenship restriction served a legitimate state interest in preserving the state's political identity. *Sugarman*, 413 U.S. at 642-43. But the Court noted that the "breadth and imprecision"

of the restriction demonstrated that it did not serve this interest. *Id.* at 643. Rather, the law was a device for protecting residents from competing for civil service jobs—an interest the Court did not find legitimate. *See id.* at 644-45. *Accord, Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 603-04 (1976) (Puerto Rico law permitting only United States citizens to practice privately as civil engineers.)

Sugarman relied in part on *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), which struck down a California law prohibiting Japanese citizens from obtaining licenses to fish off the state's coast. *See id.* at 413. The Court held that, although the federal government may regulate immigration, such a power does not permit a state to "adopt . . . the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living." *Id.* at 418-19. Again, the law was designed to protect natives against competition from outsiders—an interest which the Court did not consider legitimate.

Bridging both *Sugarman* and *Schware*, the Court held in *In re Application of Griffiths*, 413 U.S. 717, 722-23 (1973), that Connecticut could not prohibit aliens from practicing the profession of law. The state "failed to show the relevance of citizenship" to fitness or capacity to practice. *Id.* at 724. Rather, the ban was a simple matter of protecting in-state lawyers from competition by outsiders, which the Court found unconstitutional. *Id.* at 720. *See also Hampton*, 426 U.S. at 116 ("broadly denying [aliens] substantial opportunities for employment . . . deprives [them] . . . of an aspect of liberty.").

In reviewing *Yick Wo*, *Sugarman*, *Takahashi*, and other cases, this Court explained that

> resident aliens fall within the protection of the Equal Protection Clause of the Fourteenth Amendment and . . . the state [may] not deny to aliens the right to carry on a 'harmless and useful occupation' available to citizens . . . . *Yick Wo* [and other cases] proclaimed that hostility toward aliens was not a permissible ground for a discriminatory classification . . . in the sphere of private employment.

Cabell, 454 U.S. at 436-37. The decision below directly conflicts with this principle, however, in holding that nonresident workers may be discriminated against in employment solely to boost the income of resident workers.

Whether protectionism *per se* is a legitimate state interest under the Fourteenth Amendment is a vital federal question. Protectionist legislation deprives persons of their right to earn a living, which this Court has held is " 'the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure,' " and of which lawfully admitted aliens may not be deprived. *Griffiths*, 413 U.S. at 720 (quoting *Truax*, 239 U.S. at 41). Indeed, Justice Douglas called the right to earn a living "the most precious liberty that man possesses." *Barsky v. Bd. of Regents of Univ. of State of New York*, 347 U.S. 442, 472 (1954) (Douglas and Black, JJ., dissenting). Discriminating against some people in the exercise of this right, simply to boost the income of political insiders, and to protect these insiders against fair economic competition, is just the sort of "arbitrary [and] discriminatory" regulation that the Fourteenth Amendment forbids. *Nebbia*, 291 U.S. at 537. The decision below ratifies discriminatory government action which lacks any connection to protecting public health and safety, but is explicitly designed to benefit private interests. Should that decision be allowed to stand, arbitrary and discriminatory economic regulation will remain a court-blessed

"legitimate state interest" for purposes of the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: January, 2005.

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